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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

Supreme Court, U.S.
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CHARLES ELMORE

No. 34

BORAX CONSOLIDATED, LIMITED (a corporation), and PACIFIC COAST BORAX COMPANY (a corporation),

Petitioners,

vs.

THE CITY OF LOS ANGELES (a municipal corporation),

Respondent.

On Writ of Certiorari to United States Circuit Court of Appeals for the Ninth Circuit.

(Opinion of the Circuit Court of Appeals, 74 F. (2d) 901, R. 715. Opinion of the District Court, 5 F. Supp. 281, R. 161.)

BRIEF OF AMICI CURIAE IN AID OF CERTAIN CONTENTIONS OF RESPONDENT.

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BRIEF OF AMICI CURIAE IN AID OF CERTAIN CONTENTIONS OF RESPONDENT.

PRELIMINARY STATEMENT.

We represent Standard Oil Company of California, which is interested in a case involving one of the questions presented in the present case, namely, whether the Land Department can conclusively adjudicate, as claimed by the petitioners herein, a fact determining whether title to land had previously vested, and thereby cut off a prior title. It is our contention that the Land Department has no jurisdiction so to adjudicate and we respectfully ask the court's consideration of this brief in aid of that contention.

THE QUESTION DISCUSSED IN THIS BRIEF.

The respondent, the City of Los Angeles, brought this suit to quiet title to part of an island in San Pedro Harbor called Mormon Island. The City claims that the land in dispute was tideland which vested in the State of California on its admission to the Union on September 9, 1850 (9 Stats. 452), and thereafter passed to the City under a statutory grant from the State (Cal. Stats. 1911, p. 1256, amended Cal. Stats. 1917, p. 159). The petitioners claim under a federal preemption patent issued to William Banning on December 30, 1881 (Def. Exh. A; R. 96, 660), based on a survey made May 22, 1880 (R. 683).

The petitioners contend that the Banning patent was a "conclusive adjudication" of all facts necessary to sustain Banning's title (Brief on Behalf of Petitioners, Point I, pp. 26, 32 et seq.), including the fact that the land in dispute was not tideland, and that their case is uncontrovertibly made out by establishing that the land is within the lines shown on the plat of the survey. The City con-

tends that the lines so shown are not conclusive; that if the land was tideland, it passed to the State in 1850, so that the United States had no title to convey when the Banning patent was issued thirty-one years later. There is evidence justifying the conclusion that the land was tideland when California was admitted to the Union (Brief for Respondent in Opposition to Petition for Writ of Certiorari, pp. 39, 48-55). The trial court, sustaining petitioners' contention as to the conclusiveness of the patent, refused to consider this evidence (5 F. Supp. 281; R. 161). The Circuit Court of Appeals, holding with respondent that the patent was not conclusive, ordered a new trial to determine whether the land was tideland in fact.

This brief is confined to one question. Without indicating any opinion as to whether the survey line was a meander line as contended by the City, or a boundary line as contended by the petitioners, but assuming for purposes of argument that the patent intended to fix the survey line as the boundary, then—is the patent conclusive or is the court to determine whether the land was tideland, and consequently whether it belonged to the State or to the United States at and before the time the patent issued? To state the same question a little differently, could the action of the Land Department, in running a survey and issuing a patent, amount to an "conclusive adjudication" (Brief on Behalf of Petitioners, p. 32) cutting off a title which had vested in the State 30 years before? We claim that the patent does not and could not embody any such adjudication.

The plan of this brief is to present briefly the principles which we believe control this question. We will not try to

answer petitioners' arguments one by one because, notwithstanding that these arguments embody some propositions which are abstractly correct under proper circumstances, they altogether fail, we submit, to meet the present issue.

For instance, the petitioners begin their brief by stating the first of the "questions presented" as follows:

> "1. Whether the United States Land Department has jurisdiction to survey and establish the ordinary high water mark constituting the boundary between upland of an island belogging to the public domain and state tideland bordering said island" (Brief on Behalf of Petitioners, p. 4).

No one, of course, would deny that the Department has authority to make a survey. This, however, has no bearing on whether the survey and the patent referring to it constitute a *conclusive adjudication* (Brief on Behalf of Petitioners, pp. 26, 32), cutting off a title which had vested in another party *before* the survey was made (*Lane v. Darlington* (1919) 249 U.S. 331, and authorities infra, Argument B).

Petitioners claim that the authority of the Land Department to make such a *conclusive adjudication* is found in the fact that

> "The Land Department is a special statutory tribunal, erected by competent authority, to which has been delegated exclusive jurisdiction to determine *facts*, such as boundaries, which are incidental to disposition of the public domain; in this respect its functions are judicial; its findings of such *facts* are conclusive—not subject to judicial re-examination" (Brief on Behalf of Petitioners, p. 26—their italics. Italics are ours throughout the brief unless otherwise indicated).

This statement assumes that the land in suit was part of the public domain at the date of the Banning patent. This, however, is the point in controversy. The title claimed by the City is *prior* to the patent.

Again, it must be remembered that the Land Department performs many acts which are purely administrative in character. Such acts are not "adjudications". Findings of fact made by the Department acquire the force of adjudications only when they are made in a quasi-judicial capacity, and within the scope of the jurisdiction of the Department in that regard. Petitioners so admit (see their Brief, p. 82), but they nowhere show that there was anything quasi-judicial about the survey and patent in the present case, or that the Department, even if it had purported to make a conclusive quasi-judicial determination of the character of the land, had any *jurisdiction* to do so under the circumstances presented here. We submit that it had no such jurisdiction. It has power to issue a patent only for land to which legal title is in the United States. Where the dispute is whether the United States had such title when the patent issued, then the question is one for the courts and not for the Land Department to decide (authorities infra, Argument B-F).

We have not prefaced our argument with a summary because the argument itself is short, and because a summary has already been given in the topical index.

ARGUMENT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CORRECT. THE CITY IS ENTITLED TO SHOW THAT THE LAND IN DISPUTE WAS TIDELAND. IF IT WAS TIDELAND THE TITLE VESTED IN THE STATE OF CALIFORNIA, THE PREDECESSOR OF THE CITY, IN 1850, PRIOR TO THE ISSUANCE IN 1881 OF THE PATENT RELIED UPON BY PETITIONERS. THE DETERMINATION WHETHER THE LAND WAS TIDELAND IS TO BE MADE BY THE TRIAL COURT ON THE EVIDENCE; THE PATENT REFERRING TO THE SURVEY, IS NOT CONCLUSIVE.

A. Title to all California tidelands vested in the State on its admission to the Union on September 9, 1850.

Admittedly the title to all California tidelands vested in the State as an incident of its sovereignty on its admission to the Union on September 9, 1850 (9 Stats. 452). As was said by this court in *Knight v. U. S. Land Association* (1891) 142 U.S. 161, 183:

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard v. Hagan*, 3 How. 212, 229; *Goodtitle v. Kibbe*, 9 How. 471, 478; *Mumford v. Wardwell*, 6 Wall. 423, 436; *Weber v. Harbor Commissioners*, 18 Wall. 57, 65."

Similar authorities are:

Donnelly v. United States (1913) 228 U.S. 243, 260-261;

McGilvra v. Ross (1909) 215 U.S. 70;

United States v. Mission Rock Co. (1903) 189 U.S. 391, 404-405;

Mann v. Tacoma Land Co. (1894) 153 U.S. 273, 283-284.

B. The patent cannot be a "conclusive adjudication" of the fact that the land was not tideland, because the Land Department had no jurisdiction to adjudicate the title to or issue a patent for tideland.

Petitioners try to meet the rule as to the vesting of tideland in the State by claiming that the patent is a "conclusive adjudication", which is "not subject to review in any court" (Brief on Behalf of Petitioners, pp. 26, 32), of the fact that the land in dispute was not tideland. This statement presupposes that the issuance of the patent was a quasi-judicial act by the Land Department, as a *tribunal* and *within its jurisdiction*. Such assumptions, we submit, are unjustified.

The Land Department has no statutory authority to issue a patent for tidelands (*Donnelly v. United States* (1913) 228 U.S. 243, 261-262, and tideland cases supra, A). Its power to administer the public lands give it no authority in this regard, because tidelands are not public lands (*Mann v. Tacoma Land Co.* (1894), 153 U.S. 273, 284*). They become the property of the State on its admission to the Union as already shown.

The cases of *Pollard's Lessee v. Hagan et al.* (1845) 3 How. 212; and *Goodtitle v. Kibbe* (1850) 9 How. 471, hold that in case of conflict between a state tideland title and a later federal patent, the controlling question is whether the land was tideland at the time of the State's admission to the Union, and that this fact is not concluded by the patent, but is to be determined by the court from the evidence. Similar principles are borne out by the other tideland cases already cited (supra, A).

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* "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws" (*Newhall v. Sanger* (1875) 92 U.S. 761, 763).

Obviously the Banning patent in the present case could no more be an adjudication of the fact that the land was not tideland, than were the patents in the *Pollard* and *Goodtitle* cases. Evidence of the actual fact was admitted in both those cases against specific contentions that the patents were conclusive.

Petitioners say that in the *Pollard* and *Goodtitle* cases it "nowhere appears that there was any survey by the Land Department" (Brief on Behalf of Petitioners, p. 86). But even if it were permissible so to assume, it is obvious that the mere running of a survey could not be an *adjudication*, as distinguished from an administrative act, in the absence of jurisdiction to adjudicate (*Lane v. Darlington* (1919) 249 U.S. 331; *United States v. State Investment Co.* (1924) 264 U.S. 206, 212; *Kirwan v. Murphy* (1903) 189 U.S. 35, 53; *Greene v. United States* (1921—5th C.C.A.) 274 Fed. 145, 151).

Again, petitioners say that the Land Department in the *Pollard* and *Goodtitle* cases was only concerned with "what constitutes the legal boundary—not where it was located" (Brief on Behalf of Petitioners, p. 85). But the Land Department, by purporting to run a survey or fix a boundary, cannot convey lands to which the United States has no title (*Lane v. Darlington* and cases last above cited).

The foregoing considerations show, we submit, that petitioners' contention that the Banning patent was a conclusive adjudication that the State had no title is opposed to the decisions of this court concerning tideland. It is also opposed to settled principles concerning the jurisdiction of the Land Department generally. We submit that

C. It is always permissible to defeat a title based upon a United States patent by showing that the United States had no title when the patent issued, because if it had no title the Land Department had no jurisdiction to issue the patent.

To oppose a patent by evidence of a prior title is permissible either at law or in equity, and on either direct or collateral attack, because the objection goes to the jurisdiction of the Land Department to issue the patent—it "reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act" (*Smelting Co. v. Kemp* (1881) 104 U.S. 636, 641). The same proposition is stated in *Wright v. Roseberry* (1887) 121 U.S. 488, 518, in *Doolan v. Carr* (1887) 125 U.S. 618, 624-625, and in many other authorities, a few of which are cited in the succeeding paragraphs of this brief.

Whenever the legal title passes from the United States, the jurisdiction of the Land Department as a tribunal is at an end. The jurisdiction of the courts then begins and is thenceforth exclusive. As was said in *Shaw v. Kellogg* (1898) 170 U.S. 312, 341:*

> "The land passes out of the jurisdiction of the Land Department. The grant has then become complete, and the only remedy for any wrong in the transfer of such title is through the courts, and not in the Land Department."

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*This rule is the same, whether the title passes by virtue of a patent, or without a patent, as in the tideland cases and under some statutory grants. In *Shaw v. Kellogg* this court said (170 U.S. 341):

"But, it is said, no patent was issued in this case, and therefore the holding in the Barden case, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word 'patent', or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued."

Other cases standing for the same rule are:

Michigan Land and Lumber Co. v. Rust (1897) 168 U.S. 589, 592;
Whitney v. Morrow (1885) 112 U.S. 693, 695-696.

Similar rulings were made in:

Humbird v. Avery (1904) 195 U.S. 480, 504 (this court "has constantly asserted the right of the proper courts to inquire, *after title had passed from the Government*, and the question became one of private right * * *" (court's italics));

McCormick Machine Co. v. Aultman (1898) 169 U.S. 606, 609 (following *Iron Silver Mining Co. v. Campbell* (1890) 135 U.S. 286, infra. The holder of a prior title cannot be called to answer before the Land Department—"the only way his title can be impeached is by suit");

Michigan Land and Lumber Co. v. Rust (1897) 168 U.S. 589, 593 (after passage of title "the matter becomes subject to inquiry only in the courts and by judicial proceedings");

Steel v. Smelting Co. (1882) 106 U.S. 447, 454 (patent transferring title cannot be vacated by Land Department. "This can be accomplished only by regular judicial proceedings * * *");

United States v. Schurz (1880) 102 U.S. 378, 396 (when "the title to the lands has passed from the government, the question as to the real ownership of them is open in the proper courts to all considerations appropriate to the case");

Moore v. Robbins (1877) 96 U.S. 530, 533 ("* * * the courts of justice present the only remedy. * * * The functions of the [executive] department necessarily cease when the title has passed from the government");

Johnson v. Towsley (1871) 13 Wall. 72, 87 (quoted in *Humbird v. Avery*, supra).

From these principles, it follows, we submit, that

D. The question whether the land was tideland and consequently whether the United States had title at the time of the issuance of the Banning Patent, or whether the title had previously passed to the State, is a judicial question. It is not concluded by the patent.

The rule that a patent may be defeated by a prior title would be meaningless if the implications of the patent were a conclusive adjudication of the nonexistence of the facts supporting such prior title. The principle stated in the heading, therefore, is necessarily established by the cases already cited, but we supplement them by referring to other cases in which that principle has been specifically stated.

In *Iron Silver Mining Co. v. Campbell* (1890) 135 U.S. 286, an action in ejectment, the plaintiff Campbell claimed under a lode patent. The defendant mining company claimed under a placer patent, which was prior in time. The plaintiff's theory was like that of the present petitioners'; he claimed that the placer patent had been issued under the statute excepting *known* lodes from placer patents, and that the subsequent lode patent was a "conclusive" determination (135 U.S. 292, 293) of the fact that the existence of the lode was known to the placer patentee. This theory was accepted by the trial court but overruled by this court, which said (p. 293):

> "But we are of opinion that it is always and ultimately a question of judicial cognizance. The first patent conferred upon Moyer the right to this vein and to all other veins within the limits of his fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a lode

did exist, and whether it was known to him, is a question which he has a right to have tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the land department."

In *Hardin v. Jordan* (1891) 140 U.S. 371, the plaintiff (Hardin) claimed under a patent issued in 1841 for fractional sections bordering on Wolf Lake, in Illinois. She contended that, under Illinois law, the effect of the patent was to convey to the patentee, as riparian owner, title to the land in the lake bed in front of these fractional sections. This contention necessarily presupposed that the land was in fact part of the lake bed. The plaintiff's patent was based on a survey made in 1835, which ran a meander line around the lake. In 1874 the Land Department ordered a survey of everything inside the meander line and in 1881 issued a patent for land inside the line to the defendant's grantor. This was done after a hearing in the Land Department, in which all parties had appeared and in which both the Commissioner of the General Office and the Secretary of the Interior had decided that the United States had the right to patent all land within the meander lines. The defendant contended among other things that the Land Department proceedings, culminating in the issuance of his patent, were conclusive of all matters necessary to establish the validity of that patent. This court, in overruling the defendant's contention, said (pp. 400-401):

"A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the

right of the government to survey and grant the lands under Wolf-Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the government. It is contended that by this decision the question became *res judicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis v. Weibold*, 139 U.S. 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of*, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' *So that, if the lands had been 'previously disposed of', the department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purposes of governing its own conduct in the administration of its functions.*"

United States v. Rhodes (1925, 8th C.C.A.) 3 F. (2d) 771, was a suit by the United States to quiet title. The defendants were patentees from the State of Arkansas. They claimed that the land in suit had been part of the bed of Golden Lake; that fractional sections bordering on the lake had been patented to Arkansas under the swamp grant, and that the State, as riparian owner, thereby became owner of the land which it had conveyed to them. This presented "two issues of fact" (p. 772) which were

decisive of the whereabouts of the title; namely, whether the land was part of the lake bed when the survey was made and, if so, whether the meander conformed to the water line. Before the suit was brought the Commissioner of the General Land Office had had a hearing on these questions and decided both of them in favor of the government (p. 775). The government contended that this decision was controlling but the court held that the Department could not, by its findings of fact, cut off the prior title claimed by the defendants. It held "that the greater weight of the evidence is with appellees on the issues of fact" (p. 775), and on that basis decided contrary to the decision of the Land Department. The court said (p. 775):

> "If the lake was a permanent body of water in a defined basin at the time appellant parted with its title to the lands surrounding it, and if the meander line was properly run, then, under the State law, riparian rights attached and passed to subsequent grantees of the State, and those rights became vested in appellees.
>
> In 1915 the Commissioner of the General Land Office conducted a hearing on the issue which we have here, whether Golden Lake was in fact a lake, and whether or not it had been correctly meandered, and both questions were decided in favor of appellant; it was held that title to the area here involved was still vested in the Government. That decision is relied on. But the principle is firmly established that after the United States has parted with its title the executive branch of the Government loses all jurisdiction to deal with the subject-matter. The Commissioner and the Secretary of the Interior were without right or power to make any order that would in any manner or to any extent affect rights that had theretofore vested in appellees."

In *Morton v. Nebraska* (1874) 21 Wall. 660, the Land Department had issued a patent to the plaintiff. The State set up that the lands were saline, and therefore were covered by a prior statutory grant of saline lands to the State. The defense was sustained and the patent held void (pp. 674-675).

Likewise, a patent can be overcome by a showing upon extrinsic evidence that the land was embraced in a Spanish or Mexican grant so that the United States never obtained title (*Doolan v. Carr* (1887) 125 U.S. 618, 625), or that the land had been reserved or previously disposed of (authorities, supra).

Other cases holding that the Land Department cannot adjudicate facts decisive of a prior title are:

Lane v. Darlington (1919) 249 U.S. 331;

Kean v. Calumet Canal Co. (1903) 190 U.S. 452, 461;

Mitchell v. Smale (1891) 140 U.S. 406;

United States v. Hale (1925, 8th C.C.A.) 7 F. (2d) 882 (companion case to *United States v. Rhodes*, supra);

Porter v. Selleck (1926) 236 Mich. 655, 211 N.W. 261, 263.

Marks v. Martin (1875) 27 La. Ann. 527, affirmed by this court in *Martin v. Marks* (1877) 97 U.S. 345, was a swamp and overflow case. Swamp cases are not generally helpful on the present problem, because in most of them legal title does not pass from the United States until a patent issues to the State (*Brown v. Hitchcock* (1899) 173 U.S. 473). In nearly all the cases in which a Land Department ruling involving the swamp grant has come before the courts, the ruling preceded the patent, so that

jurisdiction to make the ruling was present and the question here presented did not arise. *Marks v. Martin*, however, was different from the usual case. It arose under the Act of March 3, 1857 (11 Stats. 251), which declared that all swamp selections made and reported to the Commissioner of the General Land Office prior to the passage of the statute were (with certain exceptions) confirmed. The plaintiff (Marks) claimed under a state selection made in 1852, the defendant (Martin), under a United States patent issued in 1873. Martin claimed that the federal patent was a conclusive adjudication that the land was not swamp land and not within the grant to the State. Marks contended that a survey of the land had been filed with the Commissioner prior to 1857, and that such filing under the confirmatory act had operated to pass the title to the State before the federal patent issued. In sustaining the contention of Marks the Louisiana court said (27 La. Ann. 528):

> "It is not for this court or any other to interfere with the discretion of the land officers of the United States, in their transfer to whomsoever they may choose, of the title of the United States to land. But if the United States at the moment of the adjudication had no title to the land in question, this action of the officers of the land department gave the defendant none. *And the question whether the United States had any title at the time of the adjudication, is a question for the courts of justice, clearly, and not for the officers of the land department to decide.*"

In affirming the state court's decision, this court said (97 U.S. 347):

> "If the paper signed by the surveyor-general, dated May 18, 1852, was on file in the General Land Office

at Washington, March 3, 1857, we have no doubt that the act completed and made perfect the title of the State of Louisiana to the land in controversy. If this were so, the title of the plaintiff below was superior to the patent issued subsequently to the defendant; for after the passage of that act the Land Department had no right to set aside the selections."*

The court then said that it would not disturb the finding *of the state court* that the survey had in fact been filed prior to 1857, thus necessarily holding that the contrary was *not* established by the patent.

Another important swamp and overflow case is *Wright v. Roseberry* (1887) 121 U.S. 488. This also is different from most of the swamp cases for the reason that it turned on the statute of July 23, 1866 (14 Stats. 218), confirming certain titles in California. The applicable section of this statute (section 4) directed the Commissioner of the General Land Office "to certify over" swamp lands to the State within one year after the approval of the township surveys, and also directed the Commissioner to examine the segregation surveys of the California Surveyor General and to approve them if they were found to conform to the United States surveys. The plaintiff Wright claimed title under a state patent; the defendant Roseberry, under a United States preemption patent, which (he claimed) implied a finding by the Land Department that the land was not swamp land. The state court found for the de-

*In so far as this case bears on the construction of the confirmatory act of 1857, it is only fair to point out that in *Michigan Land and Lumber Co. v. Rust* (1897) 168 U.S. 589, 603-604, this court held (contrary to the implications of *Martin v. Marks*) that the filing of a survey under that act did not pass a *legal* title, but only an equitable title. The ruling of *Martin v. Marks*, however, that the Land Department cannot adjudicate a fact decisive of the question whether legal title has passed from the government, has never been questioned.

fendant on the ground that an actual certification of the land was necessary to pass title to the State under the Act of 1866; that there had been no such certification, and that therefore the title had not left the United States and the federal patent relied on by Roseberry was conclusive, as claimed by him, of the fact that the land was not swamp land. This court reversed the state court. It held that a valid segregation survey, under the Act of 1866, was sufficient to pass legal title to the State without certification or patent if the land was, in fact, swamp land at the date of the swamp land grant (9 Stats. 519). There had been a segregation survey which antedated the federal patent. *The court accordingly held that the title passed to the State or not, depending on whether the lands were swamp lands in fact. This question, it decided, had to be determined by the court as a matter of fact, and the decision of the Land Department, claimed (as in the present case) to be implicit in the federal patent, was not conclusive* (121 U.S. 521). Answering the contention that the federal patent was conclusive, this court in part said (121 U.S. 519):

> "But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity."

A similar case to *Wright v. Roseberry* is *Tubbs v. Wilhoit* (1891) 138 U. S. 134. These two cases, contrasted with *Heath v. Wallace* (1891) 138 U.S. 573, a case relied on by petitioners, illustrate our contention in a vivid way. The facts were similar in all three of these cases, except for one circumstance. In both *Wright v. Roseberry* and *Tubbs v. Wilhoit* there was a "segregation survey", sufficient, under the Act of 1866 already mentioned, to pass title to the State, without a patent, for all lands which were swamp lands in fact. Consequently, it was held that any patent *thereafter* issued by the Land Department could not import a binding determination as to the character of the land, because such determination, being decisive of the title, was a question for the courts and beyond the jurisdiction of the department. In *Heath v. Wallace* the surveys relied on were held to be "merely private surveys" (138 U.S. 586) and not segregation surveys (138 U.S. 585-587); consequently there was nothing in the Act of 1866 under which they could pass the title out of the United States. Therefore, the Land Department, when it issued the patent in *Heath v. Wallace*, still had the jurisdiction which it did not have in *Wright v. Roseberry* or in *Tubbs v. Wilhoit*, or, as we contend, in the case at bar.

These considerations suggest

E. Another rule leading to the same result—the determination by administrative officers of jurisdictional facts is not binding on the parties or the courts. The Land Department could not make a binding or conclusive adjudication of the fact on which its jurisdiction depended at the time of the issuance of the patent, that is, of the question whether the land was tideland.

As already shown, the Land Department has jurisdiction *only* over lands to which the *title* is in the United States.

Title in connection with this rule means *legal* title (*Brown v. Hitchcock* (1899) 173 U.S. 473, 474-475, and authorities supra). Also, as already shown, the question whether the State of California had acquired title to the land in suit before the issuance of the Banning patent, depends on whether the land was tideland. If it was, then the Land Department had no jurisdiction. Yet that is the very fact of which petitioners claim that the Land Department made a conclusive adjudication when it issued the patent.

The determination by administrative officers of *jurisdictional* facts is not binding on the parties or the courts. In *Crowell v. Benson* (1931) 285 U.S. 22, this court refused to follow the findings of a commissioner under the Longshoremen's Compensation Act on the jurisdictional facts of (a) occurrence of the injury on navigable waters, and (b) the existence of the relation of master and servant. After pointing out that the ordinary rule as to the finality of determinations of fact made by administrative officers is inapplicable to *jurisdictional* facts (p. 54, et seq.), this court went on to say (pp. 56-57):

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—*for the final determination of the existence of the facts upon which the enforcement of*

> *the constitutional rights of the citizen depend.* The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. *That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend upon the facts, and finality as to facts becomes in effect finality in law.*"

There is an obvious contrast between the foregoing language of this court and the following quotation from petitioners' brief (pp. 86-87, their italics):

> "The net result of all the cases is that the Land Department within its limited field of inquiry is a special tribunal invested with judicial functions and its determination of questions so committed to it is final and conclusive (except upon appeal within the Department of the Interior), because, forsooth, *those matters have been withdrawn by Act of Congress,* in the exercise of the sovereign power of the United States, *from the field of judicial inquiry by the courts.*"

This court in *Crowell v. Benson,* in support of its ruling that administrative findings of jurisdictional facts are open to judicial review, made a reference to the land laws which is pertinent here (285 U.S. 59):

—"While, in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, it is equally true that if lands 'never were public property, *or had previously been disposed of*, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them.' This Court has held that 'matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.' *Smelting Co. v. Kemp*, 104 U.S. 636, 641. In such a case, the invalidity of the patent may be shown in a collateral proceeding."

Other cases which hold that administrative findings of jurisdictional facts are not controlling are:

Ng Fung Ho v. White (1922) 259 U.S. 276;

Radio Comm'n v. Nelson Bros. Co. (1933) 289 U.S. 266;

Interstate Comm. Comm. v. Nor. Pac. Ry. (1910) 216 U.S. 538, 543-544.

We submit that the Land Department cannot give itself jurisdiction by its own findings of fact. The patent therefore does not adjudicate that the land in suit was not tideland, and the Circuit Court of Appeals correctly decided that this question must be determined by the court.

F. The authorities cited by petitioners are not in point.

Petitioners' chief authority, *Knight v. U. S. Land Association* (1891) 142 U.S. 161, was, we submit, properly distinguished by the Circuit Court of Appeals (74 F.(2d) 903; R. 720-721). We add these brief comments to what that court said:

(1) The tideland title in the *Knight* case was the subsequent title, not the prior title as in the present case.

(2) The survey in the *Knight* case was not made and the federal patent was not issued by the Land Department in its capacity as administrator of the public lands, but in fulfillment of political obligations imposed upon the United States by international law and by the treaty of Guadalupe Hidalgo (142 U.S. 183, 184):

(3) The whole purpose of the survey and patent in the *Knight* case was to define and confirm, in fulfillment of these obligations of the United States, the boundaries of the Mexican grant. This fact sufficiently answers the petitioners' claim that the discussion of the Mexican grant in the opinion of this court was "incidental" and "legally inconsequential" (Brief on Behalf of Petitioners, p. 57, et seq.). A fact which is implicit in the whole opinion, and which differentiates a prior title from a subsequent title, cannot be so characterized.

(4) To illustrate the same thought further, a federal patent, in the ordinary public land case, is a deed, whereas, in the *Knight* case the patent, so far as the interest of the United States was concerned, was a quitclaim (142 U.S. 188). Essentially, the patent was a confirmation by the United States in its political capacity of the prior Mexican title (142 U.S. 188).

(5) In the *Knight* case, the jurisdictional fact—legal title in the United States at the time of the issuance of the patent—was present, the United States holding the title in trust for the beneficiaries of the Mexican grant (142 U.S. 183). That grant prevented the passage of a tideland title to the State of California; here the tideland

title passed to the State before the Banning patent was issued.

As regards *Cragin v. Powell* (1888) 128 U. S. 691, *Heath v. Wallace* (1891) 138 U.S. 573, and the other cases cited by petitibners (Brief, p. 40, et seq.) which involved the swamp grant, we refer to what has already been said (supra, B, discussing *Wright v. Roseberry, Tubbs v. Wilhoit, Heath v. Wallace* and *Martin v. Marks*). The swamp grant cases are in accord with, not contrary to, the principles settled, as we believe, by all the cases, that the Land Department cannot establish jurisdiction by its own findings, cannot issue patents to land which the United States does not own, and cannot adjudicate facts cutting off an existing title.

CONCLUSION.

Without expressing any opinion as to other questions in the case, we respectfully submit that, with respect to the question discussed in this brief, the decision of the Circuit Court of Appeals was correct.

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